

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

PROFESSIONAL DRY CLEANERS

CASE NO. 93-63847

Debtor

Chapter 11

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IN RE:

D. WAYNE BEECHER  
NOREEN R. BEECHER

CASE NO. 94-60123

Debtors

Chapter 11

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IN RE:

NOR-WAY ENTERPRISES, INC.

CASE NO. 93-63839

Debtor

Chapter 11

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APPEARANCES:

BOND, SCHOENECK & KING, LLP  
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Of Counsel

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

The Court has before it final Fee Applications in each of  
the above referenced and related Chapter 11 cases.

The Fee Applications have been filed by Bond, Schoeneck  
& King ("BS&K") collectively, Debtors' Counsel, having been

appointed by various Orders of this Court.<sup>1</sup>

A hearing on the Fee Applications was held in conjunction with a hearing on confirmation of the Debtors' Chapter 11 plans at Utica, New York on October 9, 1995. Written opposition to each of the Fee Applications was interposed by the United States Trustee ("UST"). At the hearing on the Fee Applications, the UST appeared and generally withdrew substantially all of its objections. The Court reserved its decision on the Fee Applications.

#### JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this contested matter pursuant to 28 U.S. C §§1334(b) and 157(a)(b)(1) and (2)(A) and (B).

#### FACTS

BS&K seeks a professional fee and reimbursement of expenses in the Beecher case of \$54,182.00 and \$1,777.17 respectively covering the period January 12, 1994 through June 16, 1995; it seeks a professional fee and reimbursement of expenses in the Nor-Way case of \$39,390.50 and \$1,464.21 respectively covering the period January 14, 1994 through June 16, 1995; finally, it seeks a professional fee and reimbursement of expenses in the

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<sup>1</sup> BS&K was appointed counsel to D. Wayne and Noreen Beecher ("Beecher") by Order dated March 23, 1994; BS&K was appointed counsel to Nor-Way Enterprises, Inc. ("Nor-Way") by Order dated April 7, 1994; BS&K was appointed counsel to Professional Dry Cleaning Inc. ("Professional") by Order dated April 11, 1994.

Professional case of \$49,072.50 and \$1,896.53 covering the period January 12, 1994 through June 16, 1995. All of the Debtors are affiliated with the Beechers being the sole officers, directors and stockholders in Nor-Way and Professional. All three of Debtors' reorganization plans were confirmed orally by the Court on October 9, 1995 subject to certain conditions. Written orders of confirmation were entered in Beecher and Nor-Way cases on December 5, 1995; there is no written order of confirmation in Professional.

#### DISCUSSION

Even though the UST withdrew substantially all of its objections to Fee Applications, the Court is under an independent duty to review all applications for professional compensation filed in a case pending pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§101-330) ("Code"). See In re S.T.N. Enterprises, 70 B.R. 823, 831 (Bankr. D.Vt. 1987). While not applicable to these cases, that practice has now been statutorily imposed on this Court by Congress in amending Code §330(a)(2).<sup>2</sup> The Court will review each application separately.

#### The Beecher Application

An examination of the Beecher application indicates that BS&K expended some 27.6 hours between the filing of the case on January 19, 1994 and March 14, 1994, the effective date of its appointment. In the Second Circuit, these so called "per se" hours

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<sup>2</sup> See Bankruptcy Reform Act of 1994, Pub.L.No. 103-394 eff. October 22, 1994.

are not compensable except in the very limited circumstance where the professional can properly claim excusable neglect, that is where the failure to seek timely appointment pursuant to Code §327(a) is due to circumstances beyond the professionals control. This Court has previously embraced the "per se" rule. See In re ICS Cybernetics, Inc., 97 B.R. 736, 738 (Bankr. N.D.N.Y. 1989).

At oral argument on the Beecher Fee Application, BS&K asserted that it "filed its applications for appointment on January 12, 1994, approximately two weeks after the petitions were filed". (Statement of Deborah Gray, Esq. at hearing held on October 19, 1995.) However, the docket of the Beecher case indicates that a voluntary petition pursuant to Chapter 11 was actually filed on January 19, 1994 and that BS&K's Application for Appointment as Beechers' counsel was first presented to the Court on March 14, 1994, with the Order of Appointment having been executed by the Court on March 23, 1994 making the appointment effective on March 14, 1994.<sup>3</sup>

BS&K offers no explanation for its delay in seeking appointment in the Beecher case, though the Court surmises that it was somehow related to the affiliated cases of Norway and Professional. BS&K's appointment as counsel to those Debtors was significantly delayed and was likewise not effective until March 14, 1994.

BS&K contends that, acting in good faith, it rendered valuable services to the Beechers in the intervening period between

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<sup>3</sup> It appears that the voluntary petitions in the Norway and Professional cases were filed on December 29, 1993 and December 30, 1993 respectively.

filing and appointment. Unfortunately, for BS&K the test is not one of good faith, it is one of excusable neglect and the Court finds no basis to deviate from the "per se" rule in the Beecher case. Thus, the Court will disallow 27.6 hours or \$3,571.50. Additionally, the Beecher Fee Application reflects some 32.2 hours devoted to preparing BS&K's instant Fee Application, while 34.2 hours were consumed in obtaining the Court ordered appointment of other professionals and preparing their fee applications. At \$130 per hour, these hours command a fee of \$8,632.00. The Court finds such a fee resulting primarily from the preparation of fee applications to be unreasonable. The Court will thus reduce this portion of the fee request to \$2,000, which the Court believes is more than adequate to compensate BS&K for its preparation of the Beecher Fee Application and those of other professionals.<sup>4</sup>

The Beecher Fee Application claims some 44.9 hours of legal research, commanding a total fee of \$5,887. It appears that the bulk of the research was devoted to Code §363 sales of real property and the tax consequences thereof from both a federal and state perspective. The Court believes that amount of legal research was unwarranted in light of the nature of issues researched, and thus, the Court will reduce the fee allowed to \$3,000 for legal research. Finally, it appears that BS&K billed some five hours of travel time at the full hourly rate, contrary to the consistent policy of this Court which is to generally compensate travel time at one-half the professionals hourly rate.

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<sup>4</sup> The Court notes that BS&K sought the appointment of and compensation for three real estate appraisal firms and one real estate broker.

Thus, the request for travel time is reduced from \$650 to \$325.

Total reductions to the Beecher Fee Application are as follows:

'per se' hours	\$3,571.50
appointment and fee application of professionals	6,632.50
legal research	2,887.00
travel time	<u>325.00</u>
	(\$13,416.00)
Fee allowed	\$40,766.00

#### The Professional Fee Application

The Court notes many of the same objections it found in Beecher. The Court begins with an analysis of the "per se" hours which total 45.20.

Unlike Beecher, the Professional case was filed on December 30, 1993 and the UST opposed an ex parte order of appointment, which necessitated BS&K's moving for appointment on notice to creditors. BS&K's motion filed March 22, 1994, was heard on April 5, 1994 and granted on April 11, 1994 making its appointment retroactive to March 14, 1994.<sup>5</sup> The motion was necessitated by the UST's contention that BS&K had a potential conflict of interest in that it represented several of Professional's creditors pre-petition. See Code §327(c).

As in the case of Beecher, BS&K asserts that it, acting in good faith, provided valuable pre-appointment services to the Debtor and shouldn't be penalized for its delay in obtaining

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<sup>5</sup> BS&K's Fee Application alleges that it filed its application for appointment on January 12, 1994. The docket of the Professional case does not support that allegation. It does indicate that an application and proposed order of appointment were filed on December 30, 1993.

appointment. The Court in an effort to minimize the impact of the "per se" rule did grant BS&K's motion retroactive to March 14, 1994. The Court again finds no excusable neglect upon which it can consider BS&K appointed effective January 12, 1994. Thus, the Court will disallow 45.2 hours of services rendered between December 30, 1993 and March 14, 1994 or the sum of \$5,859.50. Additionally, BS&K again allegedly consumed some 28.8 hours in preparing the instant Fee Application. As in the case of Beecher, while the Court is not opposed to allowing reasonable compensation in connection with preparation of a fee application, \$3,744 is beyond reasonable. The Court will reduce the allowable hours to 10 and reduce the overall fee request by \$2,444. In a similar vein, BS&K consumed 8.10 hours preparing a fee application for Suzanne M. Stoffle & Associates, Professional's court appointed accountants. The Court will not adjust that hourly request. As in the Beecher case, BS&K devoted 11.4 hours to legal research, primarily focusing on the consequences of rejecting a non-compete agreement. The Court does not find the time devoted to such legal research in the Professional case to be unwarranted or excessive.

Total reductions to the Professional Fee Application of BS&K are as follows:

'per se' hours	\$5,859.50
Fee Application of BS&K only	<u>2,744.00</u>
	(\$8,303.50)
Fee Allowed	\$40,769.00

#### The Nor-Way Fee Application

Finally, the Court reviews the Nor-Way Fee Application wherein BS&K seeks a fee of \$39,390.50 for services rendered to

that Debtor between January 14, 1994 and June 16, 1995. The Nor-Way case was actually filed on December 29, 1993. However, as in the case of Professional, the UST objected to BS&K's appointment on an ex parte basis due to its representation of several of Nor-Way's creditors, and as a result BS&K filed a motion on March 22, 1994 seeking its appointment on notice. The motion was granted on April 5, 1994 and by Order dated April 8, 1994, BS&K was appointed as Debtor's counsel effective March 14, 1994.

BS&K seeks compensation in the Nor-Way case for some 66.3 "per se" hours. BS&K argues, once again, that it was proceeding in good faith, rendering valuable and necessary services to the Debtor in the absence of an order of appointment. Again the Court rejects BS&K's argument as not meeting the excusable neglect standard. Additionally, as in the Professional case, BS&K offer no explanation as to why it waited until March 22, 1994 to file a motion pursuant to Code §327(c) when it's ex parte application for appointment had been challenged by the UST in early January 1994.

As in the case of Beecher and Professional, the Court will disallow the "per se" hours reducing the Fee Application by \$8,619.00. Additionally, the Fee Application includes 24 hours devoted to its drafting at \$130 per hour or \$3,120. The Court does not believe that such a charge is reasonable and will reduce the compensable hours to 10 and reduce the fee request by \$1,820. The time devoted to preparing the fee application of Nor-Way's accountant (4.6 hours) will not be adjusted.

Total reductions to the Nor-Way Fee Application of BS&K are as follows:



'per se' hours	\$8,619.00
Fee Application of BS&K only	<u>1,820.00</u>
	(\$10,439.00)
Fee Allowed	\$28,951.50

With regard to the expense reimbursement sought by BS&K in each case, the Court will adopt the former objections of the UST and reduce the request as follows:

Beecher	\$1,777.17	Total request
	174.95	copy overcharge
		per Local Rule 216.1
		(b)(1)(A)
	- 171.78	Westlaw/Lexis
		no documentation
	<u>\$1,424.55</u>	Total amount of expenses
		allowed
Professional	\$1,896.53	Total request
	236.40	copy overcharge
		per Local Rule 216.1
		(b)(1)(A)
	- 235.58	Westlaw/Lexis
		no documentation
	<u>\$1,424.55</u>	Total amount of expenses
		allowed
Nor-Way	\$1,464.21	Total request
	84.20	copy overcharge
		per Local Rule 216.1
		(b)(1)(A)
	- 73.46	Westlaw/Lexis
		no documentation
	<u>\$1,306.55</u>	Total amount of expenses
		allowed

IT IS SO ORDERED

Dated at Utica, New York

this            day of            1995

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge